UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 23-938

Laura Akahoshi,

Petitioner,

-v.-

Office of the Comptroller of the Currency,

Respondent.

PETITIONER LAURA AKAHOSHI'S OPPOSITION TO THE OCC'S MOTION TO DISMISS

JUSTIN S. WEDDLE
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INTRODUCTION

"It is a settled and invariable principle that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803). But the OCC seeks to create a judicial-review-free, remedy-free zone by the simple expedient of not imposing monetary penalties or a formal industry bar on respondents whose careers it has destroyed, and on whom the OCC has inflicted legal injury in the form of violations of various constitutional, statutory, and legal rights. This Court should provide the judicial review that 12 U.S.C. § 1818 and the Administrative Procedure Act guarantee to Ms. Akahoshi after enduring a five-year in-house administrative proceeding that was void ab initio and never should have been brought, as well as the gratuitous adverse factual and legal findings the OCC issued against her in the final agency order.

BACKGROUND

A. Factual Background

From 2008 to 2012, Ms. Akahoshi was the Chief Compliance Officer of Rabobank, N.A. ("RNA" or "the bank"), located in Roseville, California. Prior to that, she was a respected, senior National Bank Examiner for

the OCC. In 2012, Ms. Akahoshi received a promotion to a compliance position in the Netherlands with the bank's Dutch parent company, Rabobank.

In December 2012 and January 2013—with Ms. Akahoshi at her new position in the Netherlands—her successor as CCO engaged an outside consultant to conduct an informal review of RNA's Bank Secrecy Act/Anti-Money Laundering ("BSA/AML") program. The consultant, Crowe Horwath LLP, worked on the project for a few weeks before the bank suspended the project after a failed presentation to bank leadership on February 5, 2013. All of this occurred without any involvement of Ms. Akahoshi.

In late February 2013, Ms. Akahoshi was recalled to RNA on an interim basis to help the bank respond to the OCC's preliminary findings that all four pillars of the bank's BSA/AML program were broken. On March 22 and March 25, an OCC examiner sent two emails asking for certain Crowe documents from the suspended January 2013 engagement. Each time, after checking with RNA's General Counsel and CEO (who, unlike Ms. Akahoshi, were personally involved in the Crowe engagement and work product) to make sure she was providing accurate information,

Ms. Akahoshi promptly responded with the information they relayed to her—that the Crowe project had been suspended because the bank perceived it to be flawed and based on inaccurate information.

Two weeks later, on April 8, 2013, an OCC supervisor called the bank's CEO and said that the OCC wanted certain draft Crowe documents despite the bank's concerns about the documents' inaccuracy, and fixed April 19 as the date for the bank to produce the documents with a cover letter explaining the problems the bank perceived with Crowe's draft work. On April 18—before the agreed-upon due date—the bank sent the Crowe documents and the cover letter. The cover letter contained a paragraph, which the OCC had not asked for, describing intra-bank distribution of one specific Crowe document. Someone else at the bank, *not* Ms. Akahoshi, wrote that brief description.

The OCC's 2013 final examination report barely mentioned the Crowe drafts, and identified no violation of law by Ms. Akahoshi, the bank, or anyone else relating to draft Crowe documents. Multiple subsequent OCC examinations likewise identified no such violation.

B. Notice of Charges

Approximately five years later, on April 17, 2018, the OCC served a Notice of Charges against Ms. Akahoshi alleging three misconduct predicates related to Ms. Akahoshi's purported "concealment" of the timely-delivered Crowe documents in March and April 2013: (1) a federal felony violation of 18 U.S.C. § 1001 for making false statements; (2) unsafe or unsound banking practices under Section 1818; and (3) a direct violation of 12 U.S.C. § 481 by Ms. Akahoshi. *See* **Exhibit A**, Notice of Charges ¶¶ 40, 48(a), 50(a). The Notice sought a $50,000 civil money penalty ("CMP") and a prohibition order barring Ms. Akahoshi from the banking industry for life, under Title 12, United States Code, Sections 1818(e) and (i).

Contrary to the OCC's instant motion, "OCC Enforcement Counsel" did not issue the Notice of Charges. ECF 11.1 at 2. An individual named Michael R. Brickman wielded the executive power to issue charges against Ms. Akahoshi on behalf of the OCC. **Exhibit A**, Notice of Charges at 14; *see* Press Release, *Michael Brickman Named Deputy Comptroller for Thrift Supervision*, OCC NR 201562 (Apr. 27, 2015) (stating that the Comptroller designated Mr. Brickman to his position).

C. Administrative Proceeding

The OCC designated Ms. Akahoshi's case to be heard before an administrative law judge ("ALJ") from the pool of ALJs employed in the Office of Financial Institution Adjudication ("OFIA"). The OCC originally assigned ALJ Christopher McNeil, but after the Supreme Court's decision in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), made clear that the use of non-officers to sit as ALJs violated the Constitution, the agency reassigned the matter to newly re-appointed ALJ C. Richard Miserendino. The agency then let Ms. Akahoshi's case sit unassigned for *more than one year* when ALJ Miserendino retired at the end of 2018. On January 6, 2020, the OCC assigned ALJ Jennifer Whang.

Following another two years—including discovery and motion practice—in the OCC's administrative forum, in February 2022, ALJ Whang issued a Recommended Decision advising a prohibition order and $30,000 penalty against Ms. Akahoshi.

D. Comptroller Review and Final Decision

The parties submitted exceptions to the Recommended Decision to Acting Comptroller Michael J. Hsu. Ms. Akahoshi's exceptions explained in detail the numerous factual and legal defects with the proceeding

against her: she was entitled to summary disposition based on undisputed facts or it was error to resolve factual issues against her without a hearing; the action was barred by the statute of limitations; the OCC violated her right to due process by claiming that her alleged conduct "caused" the bank to pay a negotiated settlement with the Department of Justice ("DOJ"); the OCC had improperly prejudged her liability and *Lucia* issues; the appointments of Deputy Comptroller Brickman and the ALJ and their insulation from removal were constitutionally and statutorily defective; the Section 481 predicate failed as to an individual such as Ms. Akahoshi; the proceeding violated her Seventh Amendment right to a jury trial; the OCC's reliance on secret law violated statute; and the recommended decision incorrectly determined the CMP amount.

Enforcement Counsel asked the Acting Comptroller to increase the CMP to $50,000.

After submission of the exceptions, the Acting Comptroller requested "supplemental briefing" on three issues, which had the effect of giving Enforcement Counsel a new opportunity to brief issues it had previously ignored: whether the administrative action against Ms.

Akahoshi unconstitutionally deprived her of her right to a jury trial; the appropriate causation standard for "effects" of alleged misconduct under Section 1818; and the due process violation caused by the OCC's exclusive reliance on RNA's negotiated guilty plea to argue that Ms. Akahoshi's conduct caused loss to the bank.

In April 2023, Acting Comptroller Hsu issued a twenty-page Final Decision Terminating Enforcement Action ("Final Decision").[1] The Final Decision found that ALJ Whang had misapplied the standards for summary disposition but dismissed (instead of remanding to the ALJ) for the purported reason of "the substantial delays" that had characterized the agency's enforcement action against Ms. Akahoshi, Final Decision at 3, not based on "procedural grounds" as the OCC's present motion states, ECF 11.1 at 3.

The Acting Comptroller insisted that he was dismissing only "reluctantly," Final Decision at 3, 19; that the dismissal "in no way condone[d] or vindicate[d] Respondent's conduct," *id*. at 3; and that "[t]he actions giving rise" to the Notice of Charges "are deeply troubling," *id*. at

[1] Ms. Akahoshi filed the Final Decision with her petition for review and attaches it here as **Exhibit B** for the Court's convenience.

11. The Acting Comptroller issued multiple adverse factual findings "[b]ased on the evidence in the current record," *id.*, including, for example, that various draft, incomplete versions of a narrative-format Crowe document, which were incorporated into a PowerPoint deck presented to bank leadership, constituted a monolithic, defined "Crowe Report," *id.* at 4-8; the OCC's two March 2013 emails constituted "a direct request" for that particular "Crowe Report," *id.* at 11; and Ms. Akahoshi "and her colleagues waited nearly a month before taking steps to hand [over]" "plainly responsive" Crowe documents, *id.*

The Acting Comptroller also announced multiple legal rulings in the Final Decision, including that bankers must "*immediately* furnish[] *all* documents within their possession and control" upon OCC request, *id.* at 11 (emphasis added); and that individual bank officers have a duty under 12 U.S.C. § 481—for which they may be individually punished—to "furnish OCC examiners with certain information," *id.* at 17. These rulings directly rejected Ms. Akahoshi's arguments. The Final Decision made no mention of the constitutional and statutory defects infecting the proceedings and ignored the issues as to which the Acting Comptroller requested supplemental briefing.

Following the Final Decision, Ms. Akahoshi timely filed in this Court a petition for review of the agency action. ECF 1.1. The OCC moved to dismiss seven weeks later. ECF 11.1.

ARGUMENT

A. Overview

According to the government, Section 1818(i)(1) holds an individual whom the OCC has accused of misconduct captive in the agency's in-house enforcement proceeding until the bitter end, however flawed or unconstitutional the proceeding may be. *See* Brief for the FDIC, *Burgess v. Whang*, Dkt. No. 22-11172 (5th Cir.), Doc. 56, 2023 WL 1776782, at *30-34 (Jan. 30, 2023); *see also* 12 U.S.C. § 1818(i)(1) ("[N]o court shall have jurisdiction to . . . review, modify, suspend, terminate or set aside any such notice or order.").

Section 1818, however, does provide an Article III light at the end of the administrative tunnel. After the OCC issues its final decision, Section 1818 permits a respondent to obtain "[r]eview of such proceedings" in this Court, which can "affirm, modify, terminate, or set aside, in whole or in part, the final order of the agency," in accordance with the Administrative Procedure Act ("APA"). 12 U.S.C. § 1818(h)(2).

Not so fast, the OCC now says. Only respondents subjected to monetary penalties or prohibition orders get judicial review. In other words, the OCC believes it can drag a respondent through the mud for

years, at ruinous reputational and financial costs to her, then evade review by this Court simply by dismissing the action after much of the harm has already been done.[2] And, the agency believes that when it dismisses an action, it can issue whatever rulings it wants—including adverse factual findings and novel legal interpretations—without fear of judicial scrutiny. The Final Decision in Ms. Akahoshi's case was just such a plainly pretextual attempt by the agency to insulate itself from judicial review.

This is part of the OCC's playbook, not a one-off situation. The OCC has, in multiple instances, relentlessly litigated against an administrative respondent only to abruptly drop the charges or to issue a final decision chock-full of adverse factual findings and legal interpretations, but dismissing in an attempt to avoid judicial review. *See, e.g.*, *In re Usher*, OCC AA-EC-2017-3, and *In re Ramchandani*, OCC AA-EC-2017-2, Termination Orders (July 8, 2021) (OCC unilaterally dismissing after having successfully opposed extensive dismissal motions); *In re Adams*, AA-EC-11-50, 2014 WL 8735096, at *1 (OCC Sept.

[2] Most respondents will opt to settle rather than waste years and financial resources in the agency's in-house adjudication process.

30, 2014) (issuing adverse factual and legal findings in dismissal order after full hearing); *In re Loumiet*, AA-EC-06-102, Final Decision and Order (OCC July 27, 2009) (dismissing enforcement action after full hearing, but "largely reject[ing]" ALJ's recommended decision, which had exonerated the respondent of any misconduct).

The OCC's efforts succeed—by the undersigned's count, only *four* OCC enforcement actions have been subject to direct judicial review in nearly a quarter century, and in three of them, the court of appeals reversed the agency in whole or in part. *Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018) (reversing in part and remanding); *DeNaples v. OCC*, 706 F.3d 481 (D.C. Cir. 2013) (reversing and remanding); *Grant Thornton, LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008) (vacating and dismissing); *Ulrich v. OCC*, 129 F. App'x 386 (9th Cir. 2005) (affirming).

Worse, the OCC and the other agencies that enforce Section 1818 endorse the OCC's regulation-by-dismissal practice by treating the OCC "dismissal" decisions as authoritative precedent. For example, in *Adams*, the OCC offered the same excuse it used here (delay) to dismiss, but used the dismissal order to establish a more agency-friendly interpretation of "unsafe or unsound practice" under Section 1818 than some Article III

courts had adopted, *In re Adams*, 2014 WL 8735096, at *2-5, just as Acting Comptroller Hsu used the Final Decision here to issue a new agency-friendly gloss on Section 481, Final Decision at 17. The OCC and other agencies have since treated the *Adams* interpretation of "unsafe or unsound practice" as authoritative even though it was issued in a dismissal order and never reviewed by a court.[3] It would come as no surprise if the OCC does the same with the Final Decision here by relying on it, for example, as precedent for a future Section 481 enforcement action.

This Court should reject the OCC's transparent attempt to sweep its unconstitutional, unlawful, and unfair conduct against Ms. Akahoshi under the rug by purporting to "moot" the issues with a last-minute dismissal. *See* Final Decision at 20.

B. This Court Has Jurisdiction

Section 1818 provides the courts of appeals jurisdiction to review administrative enforcement actions once the agency issues a final

[3] *See, e.g.*, *In re Ramchandani*, OCC AA-EC-2017-2, Order Denying Respondent's Motion to Dismiss and Order Granting Enforcement Counsel's Motion to Strike, at 26-27 (July 28, 2020); *In re Smith*, 18-036-E-I, Final Decision, at 39-43 (Fed. Reserve March 24, 2021); *In re Bank of La.*, 12-489(b), 12-479(k), Final Order, at 16 (FDIC April 21, 2020). In the action against Ms. Akahoshi, both Enforcement Counsel and the ALJ liberally cited *Adams*.

decision, in accordance with the APA. 12 U.S.C. § 1818(h)(2).[4] This Court has the power "to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency." *Id.*

The Court obtains jurisdiction to review Section 1818 "proceedings" rather than merely the terms of the agency's final decision. *Id.* ("Review of such *proceedings* shall be had as provided in chapter 7 of Title 5." (emphasis added)). The APA states that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. Furthermore, the APA commands this Court to "hold unlawful and set aside agency action, findings, and conclusions found to be" arbitrary, unconstitutional, unsupported by substantial evidence, procedurally defective, or otherwise not in accordance with law. 5 U.S.C. § 706(2). Such determinations must be made on "the whole record or those parts of it cited by a party." *Id.* § 706.

By the plain terms of the applicable statutes, therefore, this Court has jurisdiction over Ms. Akahoshi's petition for review. Ms. Akahoshi is

[4] Either the D.C. Circuit or the court of appeals "for the circuit in which the home office of the depository institution is located" has jurisdiction. 12 U.S.C. § 1818(h)(2).

a "party to the [enforcement] proceeding"; Acting Comptroller Hsu issued a final decision; and Ms. Akahoshi timely filed her petition in this Court. 12 U.S.C. § 1818(h). The Court's review is not limited to the language of the Final Decision—it encompasses the entire proceeding, including the "preliminary, procedural, or intermediate" actions that preceded the Final Decision. 5 U.S.C. § 704.

The OCC's contrary argument that "this Court lacks subject matter jurisdiction," ECF 11.1 at 5, wrongly conflates jurisdiction with notions of mootness and aggrievement. Furthermore, the cases cited in the OCC's motion, *see id.* at 7-8, are inapposite. The two D.C. Circuit cases on which the OCC relies addressed, respectively, whether agency findings and an interlocutory ALJ finding constituted "final orders" under the statutory review scheme—47 U.S.C. § 402(a) and 28 U.S.C. § 2432—at issue there. *See Am. Tel. & Tel. Co. v. FCC*, 602 F.2d 401, 406-07 (D.C. Cir. 1979) ("*AT&T*"); *Sea-Land Serv. v. Dep't of Transp.*, 137 F.3d 640, 647 (D.C. Cir. 1998).[5] Here, there is no question that the Final Decision was a final

[5] The OCC's motion also incorrectly says, "The Seventh Circuit likewise has held that a reviewing court lacked jurisdiction to entertain a prevailing administrative litigant's request to alter the language the [EPA] used in its consent decree," ECF 11.1 at 7-8. In *United States v. AccraPac, Inc.*, 173 F.3d 630 (7th Cir. 1999), there was no "administrative litigant" at all, much less a "prevailing" one—the United States sued a company in federal district court due to hazardous waste at a company site,

agency decision that vests this Court with jurisdiction under Section 1818(h)(2) and chapter 7 of the APA.

C. The Administrative Enforcement Proceeding Is Reviewable

"Legal lapses and violations occur" in administrative proceedings, "and especially so when they have no consequence." *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.* 139 S. Ct. 361, 370 (2018) (quoting *Mach Mining v. EEOC*, 575 U.S. 480, 489 (2015)). "That is why" the Supreme Court "has so long applied a strong presumption favoring judicial review of administrative action." *Id.* (quoting *Mach Mining*, 575 U.S. at 489). "The presumption may be rebutted only if the relevant statute[s] preclude[] review." *Id.* (citing 5 U.S.C. § 701(a)(1)).[6]

Section 1818 makes administrative enforcement actions reviewable when the agency issues a final decision—"Any party" "may obtain review

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and the company settled by consenting to an environmental remediation plan "agreeable" to the EPA. *Id.* at 630. After the EPA agreed to the remediation plan, the company asked the district court overseeing the consent decree (between the United States and the company) to make the EPA's approval memorandum "more neutral." *Id.* On appeal, the Seventh Circuit held that the district court's jurisdiction to enforce the consent decree did not allow the court to alter language in the EPA's administrative memorandum about the plan. *Id.* at 634. Nothing about that holding affects Section 1818's clear grant of jurisdiction to this Court here.

[6] The presumption favoring judicial review may also be rebutted if the action is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), but the OCC nowhere argues in its motion that Ms. Akahoshi's petition is unreviewable on that basis.

of any" final decision in an agency enforcement action. 12 U.S.C. § 1818(h)(2). Once that threshold has been met, as it was here when the OCC issued the Final Decision, Section 1818 contains no independent bar to judicial review.

Section 1818 incorporates the APA's review provisions, which entitle "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action" "to judicial review thereof." 5 U.S.C. § 702. The suffering of a "legal wrong" refers to "the invasion of a legally protected right." *Penn. R. Co. v. Dillon*, 335 F.2d 292, 294 (D.C. Cir. 1964). That includes the right not to suffer the stigma of agency blacklisting "except in an authorized and procedurally fair manner." *Gonzalez v. Freeman*, 334 F.2d 570, 574-75 (D.C. Cir. 1964). "Adversely affected or aggrieved" means having suffered an injury "within the 'zone of interests' sought to be protected" by the relevant statute. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990).

In keeping with the presumption favoring judicial review of administrative action, courts take an expansive view of the "legal wrong" and "aggrievement" requirements: the review provisions of the APA are "generous," and the Supreme Court construes them "not grudgingly but

as serving a broadly remedial purpose." *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 156 (1970).

1. Injury from the Defective Proceeding

The Supreme Court has, on multiple occasions, made clear that when an agency subjects a respondent to a structurally defective, unconstitutional enforcement proceeding, the respondent suffers concrete "legal wrong" for standing purposes. "In the specific context of the President's removal power, we have found it sufficient that the challenger 'sustains injury' from an executive act that allegedly exceeds the official's authority." *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2196 (2020) (quoting *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)); *see also Axon Enter., Inc. v. FTC*, 143 S. Ct. 890, 904 (2023) ("subjection to an unconstitutionally structured decisionmaking process," by itself, is a "'here-and-now' injury"). "Subjection" to an unconstitutional process is a legal injury "*irrespective of its outcome*, or of other decisions made within it." *Axon*, 143 S. Ct. at 904 (emphasis added). Thus, a respondent's claim that the agency process is illegitimate provides standing for judicial review regardless of whether the respondent prevailed. *Id.* at 903.

Ms. Akahoshi alleges precisely such harm. She was subject to ruinous litigation and continuing reputational harm by an administrative action initiated by an OCC employee without the constitutional authority to do so; dispossessed of her right to a jury trial before an Article III court; subjected to the decisions of an unconstitutionally insulated ALJ; forced to litigate time-barred claims based on the OCC's position that its enforcement actions can "*first* accrue" over and over again, *see* 28 U.S.C. § 2462 (emphasis added); accused of a nonexistent Section 481 violation; and deprived of due process in multiple ways. In other words, she has been "subject[] to an illegitimate proceeding, led by an illegitimate decisionmaker." *Axon*, 143 S. Ct. at 903. "That harm may sound a bit abstract; but [the Supreme Court] has made clear that it is 'a here-and-now injury.'" *Id.* (quoting *Seila Law*, 140 S. Ct. at 2196). And Ms. Akahoshi included these challenges from the beginning. *See* **Exhibit C** (Answer). This Court should afford her judicial review.

2. Case-Specific Injury

The Court may also review Ms. Akahoshi's case-specific factual and legal challenges, including that undisputed facts prove she committed no misconduct, and that the OCC violated her due process rights.

The OCC could have issued a two-sentence order dismissing due to the passage of time. Instead, the OCC issued a twenty-page decision that gratuitously **(1)** lamented that the dismissal was "reluctant" because Ms. Akahoshi's conduct was "deeply troubling," Final Decision at 11; **(2)** set forth an expansive legal rule, found nowhere in statute or duly promulgated regulation, that "[b]ank personnel are therefore required to give any OCC examiner prompt and complete access to all personnel and materials during on-site examinations of any length, scope, or type," *id.*; *see also id.* at 20 ("remind[ing] institutions and IAPs, in the strongest possible terms," of that newly-announced duty); **(3)** adopted multiple factual findings adverse to Ms. Akahoshi "[b]ased on the evidence in the current record," *see id.* at 4-8, 11; and **(4)** rejected Ms. Akahoshi's legal arguments related to the 12 U.S.C. § 481 misconduct predicate, interpreted the "text of § 481," its "purpose," and its "core premise," and

speculated as to what an IAP's "violation" of Section 481 might entail, *id.* at 17.

Thus, whereas the FCC in the OCC's main case—*AT&T*—took pains to avoid cloaking legal and factual findings in "nonreviewable garb," *AT&T*, 602 F.2d at 409, the OCC embraced the dismissal order as an opportunity to make factual and legal rulings against Ms. Akahoshi, and to announce legal duties of regulated institutions and individuals, believing that it could do so without Article III review. These circumstances invite judicial scrutiny rather than forbid it. And, to decline review would contravene the APA's direction to courts to "hold unlawful and set aside" defective agency "actions, findings, and conclusions." 5 U.S.C. § 706(2).

There appears to be no limiting principle to the OCC's position. According to the agency, Acting Comptroller Hsu could have said *anything* in the Final Decision, and it would not be subject to judicial review as long as he included one sentence dismissing the enforcement action (purportedly due to the passage of time). Thus, the OCC surmises, the Acting Comptroller could have found that Ms. Akahoshi committed a criminal violation of 18 U.S.C. § 1001; issued an extensive decision

rejecting her Appointments Clause, jury trial, and other constitutional challenges; announced new legal interpretations of OCC regulations; and more, and this Court could review *none* of it.

3. Residual Reviewability

If this Court decides it may not hear Ms. Akahoshi's petition for review because she was not wronged by the administrative enforcement action under Section 702, then the APA's residual provision would apply: "Agency action made reviewable by statute and final agency action *for which there is no other adequate remedy in a court* are subject to judicial review." 5 U.S.C. § 704 (emphasis added). As discussed, the government claims that Section 1818 prevents an OCC respondent like Ms. Akahoshi from collaterally challenging the enforcement proceeding, other than pursuant to a *post hoc* petition for Circuit Court review, as Ms. Akahoshi filed here. *See* 12 U.S.C. § 1818(i)(1). Thus, if judicial review is unavailable to Ms. Akahoshi under Section 702, as the OCC's instant motion claims—even now that she endured the OCC's entire unconstitutional administrative process over the course of five years and received a final agency decision—then review must be available under

Section 704 otherwise she would never obtain an "adequate remedy in a court." 5 U.S.C. § 704.

The OCC's suggestion that ancillary proceedings under the Equal Access to Justice Act ("EAJA") offers an adequate remedy in the form of attorneys' fees, *see* ECF 11.1 at 13 n.2, rings hollow and is incorrect. *First*, the OCC has not, as one might have expected, readily agreed to Ms. Akahoshi's EAJA fee application to provide her the statutory relief that the OCC here claims is adequate to remedy her constitutional and other injuries. Instead, the agency is fighting Ms. Akahoshi's EAJA application with every possible argument, even (in direct contradiction to the OCC's present motion) claiming that Ms. Akahoshi is not a *prevailing party*. *See* **Exhibit D** (excerpt from OCC's EAJA opposition). *Second*, the EAJA only awards attorneys' fees where the agency's position was not "substantially justified" and no "special circumstances" would "make an award unjust." 5 U.S.C § 504(a)(1). *Third*, Ms. Akahoshi, personally, will not receive monetary relief because an insurance company advanced her defense costs.

D. The Petition Presents a Redressable Controversy

1. Mootness

The OCC's motion makes no claim of mootness, and for good reason, since "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party. The case remains live as long as the parties have a concrete interest, however small, in the outcome of the litigation." *MOAC Mall Holdings LLC v. Transform Holdco LLC*, 143 S. Ct. 927, 934 (2023) (cleaned up).

The circumstances here readily satisfy that standard. Ms. Akahoshi has a concrete interest in this Court's review of her petition because without such judicial review, she will continue to suffer the reputational harm of the Acting Comptroller's gratuitous comments and the stigma of the entire proceeding against her. In addition, Section 1818 suggests that if the OCC has a change of heart "at any time," it may reinstate the administrative charges, impose penalties against Ms. Akahoshi, remand to the ALJ, or otherwise "modify, terminate, or set aside" the final order. 12 U.S.C. § 1818(h)(1). Only the filing of the appellate record on petition for review to this Court prevents the OCC from unilaterally taking those actions. *Id.* ("Upon such filing of the record, the agency may modify,

terminate, or set aside any such order *with permission of the court*." (emphasis added)).

The Court's review will finally provide Ms. Akahoshi with her day in (an Article III) court to review and set aside as defective the OCC's "actions, conclusions, and findings." *See* 5 U.S.C. § 706(2).

2. Redressability

The standard for redressability is similarly permissive, as it requires only a non-speculative likelihood "that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561. An injury is redressable merely if judicial relief could provide compensation or "eliminate *any* effects" of the complained-of action. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105-06 (1998) (emphasis added).

Here, the Court can provide redress in multiple ways. *First*, the Court can set aside the agency enforcement action against Ms. Akahoshi as void *ab initio*—based on the void Notice of Charges issued by an individual who was not constitutionally appointed to wield officer powers; the unconstitutional insulation which ALJs enjoy; the deprivation of Ms. Akahoshi's right to a jury trial before an Article III court in this quasi-criminal action; or other constitutional defects. *See* 5 U.S.C. § 706(2)(B)

("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . contrary to constitutional right"). *Second*, the Court can strike or modify the gratuitous adverse factual findings the OCC issued in the Final Decision "[b]ased on the evidence in the current record," Final Decision at 11, as well as the legal conclusions the agency reached, particularly with respect to the Section 481 predicate. *Third*, the Court could modify the final decision to declare that the proceeding was invalid based on the remaining constitutional and statutory defects in the administrative proceeding—including that the OCC brought the action after the limitations period had expired and prejudged (or appeared to have prejudged) the allegations in violation of due process. *See* 5 U.S.C. § 706(2)(A)-(D). All of these options would eliminate at least some of the harmful "effects" of subjecting Ms. Akahoshi to an illegitimate proceeding followed by a dismissal order, purportedly based on administrative delay, that nonetheless reached unnecessary factual and legal findings against her.[7]

[7] None of these options involves "reinstat[ing] the enforcement proceeding," as the OCC threatens. *See* ECF 11.1 at 14. Acting Comptroller Hsu's discretionary act dismissing the proceeding is beyond this Court's APA review power. *See* 5 U.S.C. § 701(a)(2) (APA review does not apply to "agency action . . . committed to agency discretion by law"). Therefore, Ms. Akahoshi cannot be subjected to reinstated enforcement proceedings by seeking judicial review of the illegitimate agency process

The OCC's motion points to *Axon* for the proposition that this Court cannot redress Ms. Akahoshi's judicially-recognized harm, *see* ECF 11.1 at 13-14, but that perverts the holding of *Axon*. In *Axon*, the Supreme Court found judicial review *available* to respondents who challenge future constitutionally unsound agency proceedings. 143 S. Ct. at 900. It would be ironic indeed to read *Axon* to permit the courts to redress harm that a respondent *has not yet suffered* but to deny redress to an individual like Ms. Akahoshi, who suffered in full, over the course of five years, the injury of being forced to litigate in the OCC's defective forum.

she endured and the adverse legal and factual findings issued against her. And, as the OCC has noted, the Court's options on review are limited, ECF 11.1 at 6, and do not include a remand to the agency or continued administrative proceedings.

CONCLUSION

For the reasons stated above, the Court should deny the OCC's motion.

Dated: New York, New York
July 6, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

This motion opposition complies with the type-volume limitation of Federal Rule of Appellate Procedure 27 because it contains 5,190 words. This motion opposition therefore also complies with the twenty-page limitation of Circuit Rule 27-1 because Circuit Rule 32-3 converts that page limit into a 5,600 word limit. The motion complies with the type style requirements of Federal Rule of Appellate Procedure 27 because it was prepared in Century Schoolbook, a proportionally-spaced font, in 14 point type.

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